

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

FILED

AUG 15 2001

INDIANA UTILITY  
REGULATORY COMMISSION

In the Matter of the Petition of Indiana Bell )  
Telephone Company, Incorporated d/b/a )  
Ameritech Indiana, Pursuant to I.C. 8-1-2-61, )  
for a Three-Phase Process for Commission ) Cause No. 41657 (EDR-1)  
Review of Various Submissions of Ameritech )  
Indiana to Show Compliance with Section 271(c) )  
of the Telecommunications Act of 1996 )

**AMERITECH INDIANA'S REPLY IN SUPPORT OF  
VERIFIED MOTION FOR STAY PENDING APPEAL**

This proceeding – initiated at the request of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana (“Ameritech Indiana”) as part of its efforts to show compliance with Section 271(c) of the 1996 Telecommunications Act – includes third-party independent testing of Ameritech Indiana’s OSS. In its Order on EDR-1, the Commission ordered that DSL Transport provided by Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions, Inc. (“AADS”) be included in the OSS Test. Ameritech Indiana and AADS have appealed that Order and have also filed separate, verified Motions to Stay the Order's implementation pending appeal, showing *inter alia* that:

- (a) If the appeal is successful, inclusion of the DSL Transport will unnecessarily have delayed the OSS Test while imposing substantial burden and expense on Ameritech Indiana and others involved in that Test (as well as upon AADS), all of which can be avoided by a stay;
- (b) A stay will not compromise or delay other aspects of the OSS Test, and indeed, should permit them to proceed *more* rapidly;
- (c) A stay will not materially delay completion of the OSS Test even if the Order on EDR-1 is upheld and DSL Transport must then be included;

(d) The appeal is capable of rapid resolution, since it turns on a discrete, dispositive issue of federal law on which Ameritech Indiana and AADS have a substantial likelihood of success; and

(e) Even if there were any potential material harm in this proceeding from any delay in completing the OSS Test due to a stay, that harm would be to Ameritech Indiana – since the proceeding itself was initiated at Ameritech Indiana’s request as part of its desire ultimately to obtain FCC authority to provide additional services under pertinent provisions of the 1996 Telecommunications Act.

In their unverified Response opposing the stay, the Indiana CLECs ignore most of these points, and misstate the pertinent law and facts on the matters they do purport to address. That Response shows no basis for denying a stay of the Order on EDR-1 pending appeal.

The Indiana CLECs' Response essentially ignores and leaves unrefuted the separate AADS and Ameritech Indiana showings and analyses of the “harms” that warrant a stay pending appeal. Particularly noteworthy is CLEC silence throughout the Response on the very purpose of the underlying proceeding in which the Order on EDR-1 was entered, which underscores the appropriateness of a stay. The central purpose of this proceeding, which was initiated at Ameritech Indiana’s request, involves Ameritech Indiana's efforts to obtain FCC authority to provide additional services. The OSS Test herein, and the Commission’s later recommendations to the FCC which may be based thereon, are part of those Ameritech Indiana efforts to expand *its* business. Hence, the party principally if not exclusively “harmed” by delay in the completion of OSS Test, if any, which might theoretically be caused by a stay, is Ameritech Indiana itself, which is seeking that stay.

The CLECs present no evidence<sup>1</sup> of any harm which they would suffer from the delay of OSS testing of DSL requested in Ameritech Indiana's Motion for Stay. Instead, they make only vague assertions that they are somehow being precluded from entering the Indiana DSL market if OSS testing of DSL is not done as a part of the first round of testing. This is a non sequitur. If the CLECs are really interested in furthering the competitiveness of the local market (instead of merely delaying Ameritech Indiana's entry into the long distance market), they would not wish to cause the delay of testing of all the other Ameritech OSS, which will inevitably be caused by the addition of DSL to the testing protocol at the time.

Because no significant harm will be suffered by the CLECs from the requested stay, they devote most of their Response to asserting that the appeal of the Order on EDR-1 does not have a likelihood of success. Since the balance of harms from the Order versus harms from a stay clearly weighs in favor of a stay, the Commission should grant the stay if the appeal presents a substantial legal issue, regardless of whether the Commission thinks Ameritech Indiana will prevail. In any event, the likelihood of success on appeal cannot be judged by the CLECs' Response because the CLECs do not even address the true appellate issue.

Ameritech Indiana's contention as to the legal issues to be raised on appeal can be summarized as follows:

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<sup>1</sup> Ameritech Indiana's Motion for Stay was verified, thereby presenting the Commission with sworn evidence in compliance with the Commission's rules. 170 IAC 1-1-7(f),-11(c). It is entirely appropriate for Ameritech Indiana to submit new evidence on the harms to be caused by the Order on EDR-1, an issue not before the Commission until stay was sought. The CLECs have offered no contrary sworn evidence.

(a) Under federal law, including DSL Transport in the OSS Test would be proper only if the DSL Transport in question is within the scope of § 251(c)(4), which does not apply unless a service is *both* (i) a "telecommunications service" (not an information service) *and* (ii) provided "at retail";

(b) The DSL Transport which is being provided by AADS to non-affiliated ISP customers is not within the scope of § 251(c)(4) because the FCC's Second Report and Order and FCC regulation 47 C.F.R. § 51.605(c) specifically state that such sales are not "at retail"; and

(c) The DSL Transport acquired by AIMS from AADS and then included as a component of the combined DSL Internet access service provided by AIMS to its customers at retail is also not within the scope of § 251(c)(4) because the service provided by AIMS (including any DSL component thereof) is an "information service," not a "telecommunications service" within the meaning of the Act.

Rather than confront these points, the Indiana CLECs pretend that Ameritech Indiana is trying to rely on the existence of "separate affiliates" to avoid resale obligations under § 251(c)(4). Not so. Nothing – repeat, nothing – in Ameritech Indiana's position turns on whether any service is offered by an affiliate rather than by Ameritech Indiana itself.

Thus, *it does not matter* whether DSL Transport provided by AADS to non-affiliated ISPs is considered to be offered by Ameritech Indiana itself (thus disregarding the affiliate). Such DSL Transport is not subject to § 251(c)(4), regardless of what entity is doing the offering, *because it is not being offered at retail*. Likewise, *it does not matter* whether the combined Internet access service offered at retail by AIMS is considered to be provided by Ameritech Indiana itself (thus disregarding the affiliate). Such service is not subject to § 251(c)(4), regardless of what entity is doing the offering, *because federal law makes clear that the retail*

service is an "information service," not a "telecommunications service." None of this would change even if AADS and AIMS did not exist, and both the DSL Transport provided by AADS and the retail Internet access service provided by AIMS were instead being provided by Ameritech Indiana.<sup>2</sup>

The Commission's error, which will be the subject of the appeal, was its belief that DSL Transport being provided as part of Internet access service is a separate "telecommunications service" when received by AIMS's retail customers. This is contrary to the clear pronouncements of the FCC that a transport service like DSL, when provided as a component of an "information service" such as Internet access, is not a "telecommunications service" under the Act, but is merely a part of a combined service which in its totality is an "information service." This was made clear by the FCC in its 1998 Report to Congress<sup>3</sup>:

56. . . . We understand this term ["hybrid services"] to refer to services in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and as an inseparable part of that service transmits information supplied or requested by the user.

57. It follows from the statutory analysis set out in Part III.C of this Report that hybrid services are information services, and are not telecommunications services. . . .

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<sup>2</sup> Ameritech Indiana has consistently made this key point. *See, e.g.*, Request for Review and Reversal of ALJ-EDR-1 at 8 (emphasis in original):

Since "information services" are not subject to the Section (c)(4) wholesale resale obligation, Ameritech Indiana is not avoiding its Section (c)(4) obligation when the ISP, affiliated or not, provides the information service directly to the public. In simple language, there is no Section (c)(4) obligation on *any entity* to resell at wholesale rates the combined information service of ADSL Transport Service and Internet Service. Therefore, Ameritech Indiana cannot be "avoiding its Section (c)(4) obligation" when its affiliated information service provider (AIMS) offers the combined information service.

<sup>3</sup> In the Matter of Federal-State Joint Board on Universal Service, (Report to Congress), CC Docket No. 96-45, 13 FCC Rcd. 11501, ¶¶ 56-59, 73-74, 80-81 (April 10, 1998)

58. . . . An offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components. . . .

. . . .

80. The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."

Thus, even though AIMS sells an enhanced service which utilizes ADSL, no "telecommunications service," as defined in the Act, is being provided "at retail" to end-user customers by anyone, as would be required before § 251(c)(4) of the Act becomes applicable. The Commission's apparent characterization of AIMS's retail service as provision of a "telecommunications service" along with an "information service" is contrary to the FCC's determination that there is only one "information service" being provided to the customer. The CLECs' Response misstates the true appellate issue and attacks a straw man.

Similarly, the Indiana CLECs' citation of the FCC's recent § 271 Decision with respect to Verizon in Connecticut<sup>4</sup> is irrelevant to the central "information service" issue to be appealed in this proceeding. The Verizon affiliate, VADI, was offering an undisputed "telecommunications service," and Verizon was trying to limit the resale obligation under § 251(c)(4) to situations

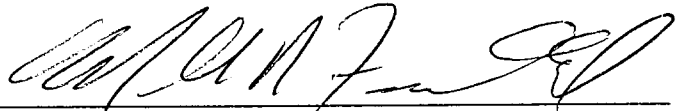
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<sup>4</sup> In the matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, CC Docket No. 01-100, 2001 FCC LEXIS 3955 (July 22, 2001), ¶¶ 27-33.

when the affiliate's data telecommunications service was bundled with Verizon's voice telecommunications service. The FCC rejected that limitation. The FCC's Verizon/Connecticut decision did not deal with or change the FCC position that provision of an "information service," such as Internet access, is not subject to § 251(c)(4), whether provided by an LEC or an affiliate.

The potential harm from enforcement of the Order on EDR-1 clearly outweighs the potential harm resulting from a stay. Ameritech Indiana's appeal will present a straightforward legal issue of federal law based on FCC pronouncements which are contrary to the Commission's Order. Therefore, movant Ameritech Indiana has satisfied the requirements for a stay. The requested stay pending appeal is appropriate and should be granted.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2001 I caused copies of the foregoing Verified Motion for Stay to be served upon the following counsel of record and other interested persons by United States Mail, first-class postage prepaid, and also electronically via the Ameritech 271 distribution list at [ameritech271@urc.state.in.us](mailto:ameritech271@urc.state.in.us) (for such counsel and other persons included on that list):

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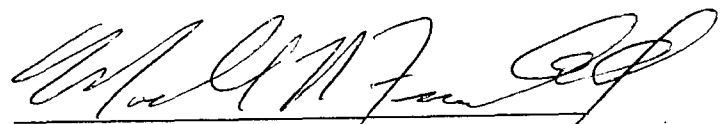
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